REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1291 of 2019
(ARISING OUT OF SLP (CIVIL) NO.6221 OF 2018)

SWARAJ INFRASTRUCTURE PVT. LTD. …APPELLANT

VERSUS

KOTAK MAHINDRA BANK LTD. …RESPONDENT

WITH

CIVIL APPEAL NO. 1292 of 2019
(ARISING OUT OF SLP (CIVIL) NO.6458 OF 2018)

CIVIL APPEAL NO. 1294 of 2019
(ARISING OUT OF SLP (CIVIL) NO.6571 OF 2018)

CIVIL APPEAL NO. 1293 of 2019
(ARISING OUT OF SLP (CIVIL) NO.6597 OF 2018)

J U D G M E N T

R.F. Nariman, J.

1. Leave granted.

2. The present case involves the right of a secured creditor to file a winding up petition after such secured creditor has obtained a decree from the Debts Recovery Tribunal ["**DRT**"] and a recovery certificate based thereon.

3. Several appeals were taken up together for hearing by the Division Bench of the Bombay High Court. The brief facts necessary to decide the present appeals are as follows:

The respondent, Kotak Mahindra Bank Limited, advanced various loans to the companies in question. The outstanding amount against these companies as on date, together with interest, is stated to be in the region of INR 48 crores. The respondent approached the Debts Recovery Tribunal, Mumbai by filing three separate original applications to recover the debt owed to them. The Debts Recovery Tribunal delivered three separate judgments on 16.01.2015 allowing the applications filed by the respondent bank. Apparently, the said orders are final as no appeals have been preferred to the Debts Recovery Appellate Tribunal ["**DRAT**"], Mumbai. Recovery certificates dated 12.08.2015 for the said amounts were then issued by the Recovery Officer under Section 19(19) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ["**Recovery of Debts**

Act"]. We have been informed that various attempts were made to auction the properties that were security for the loans granted, but each of these attempts has yielded no results.

In the meanwhile, the respondent issued statutory notices dated 15.04.2015 under Sections 433 and 434 of the Companies Act, 1956. As no payments were forthcoming, a company petition was filed before the Bombay High Court on 03.07.2015. By an order dated 26.07.2017, the said petition was admitted as the companies in question were said to be commercially insolvent. In the appeals that were filed to the Division Bench of the Bombay High Court, the main point argued was that once a secured creditor has obtained an order from the DRT, and a recovery certificate has been issued thereupon, such secured creditor cannot file a winding up petition as the Recovery of Debts Act is a special Act which vests exclusive jurisdiction in the DRT. Also, a secured creditor can file a winding up petition only on giving up its security, which has not been done in the present case. These contentions did not find favour with the Division Bench who then dismissed the appeals in question.

4. Shri K. Parameshwar, learned advocate, appearing on behalf of the appellants, has urged a number of points before us. He first argued

that this Court has held that the Recovery of Debts Act is a special statute *qua* the general statute of the Companies Act, 1956, and that this Court has further held that exclusive jurisdiction is vested in the DRT under the Recovery of Debts Act to the exclusion of the Company Court. As this is so, once the DRT has been approached, the necessary corollary is that a winding up petition to realize the same debt would be expressly barred on a conjoint reading of Sections 17 and 18 of the Recovery of Debts Act. He further argued that in any case, the secured creditor is put to an election where it must either relinquish its security and stand in line in the winding up proceeding or realize its security outside the winding up proceeding. On the facts of the present case, it has filed a successful action to realize its security outside the winding up proceeding, as a result of which, the winding up proceeding filed by it, without giving up the mortgaged security, would not be maintainable. It was further argued that, in any event, Section 434(1)(b) of the Companies Act, 1956 would be attracted, and not Section 434(1)(a), and that since the security has not yet been realized, the winding up petition dressed up under Section 434(1)(a), but really under Section 434(1)(b), would not be maintainable. Also, reliance on certain High Court judgments by the impugned judgment is

completely misplaced for the reason that the provisions of the Companies Act, 1956 would show that the secured creditor has to relinquish its security when it files a winding up petition, and not thereafter, as has been held in these judgments.

5. In answer to these contentions, Shri Shyam Divan, learned Senior Advocate appearing on behalf of the respondent, has argued, relying upon Section 439 of the Companies Act, 1956 in particular, that a secured creditor can maintain a winding up petition in the fact situation as obtains in the present case. According to him, the judgment relied upon by the appellant, namely, **Allahabad Bank v. Canara Bank**, (2000) 4 SCC 406, is distinguishable in that the context of that judgment was whether leave had to be obtained from the Company Court when a winding up proceeding is either pending, or a winding up order is made, in order to pursue a debt recovery proceeding under the Recovery of Debts Act. He also argued before us that the election that is to take place with the secured creditor giving up its security is at the stage of proof of claims, which is only after a winding up order has been passed, and which stage has not yet arrived on the facts of the present case. Also, according to him, the petition has been filed only on the ground of inability to pay debts, and

once the statutory presumption is raised under Section 434(1)(a) of the Companies Act, 1956, it is clear that winding up must follow in the absence of payment of outstanding amounts of debts owed. According to the learned Senior Advocate, his client has gone from pillar to post in an attempt to recover the loans made to the appellants and has not yet succeeded in any endeavour to do so. Also, nothing has been repaid so far and the debt owed by these companies, which is mounting, amounts to a staggering figure of INR 48 crores. According to the learned counsel, therefore, the High Court was right in dismissing the appeal filed by the appellants.

6. After hearing learned counsel for both sides, it is important to first set out the relevant provisions of the Companies Act, 1956 and the Recovery of Debts Act, 1993.

Section 434(1) of the Companies Act, 1956 reads as follows:

> "**434. Company when deemed unable to pay its debts**.—(1) A company shall be deemed to be unable to pay its debts—
>
> (*a*) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one lakh rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due

and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;

(*b*) if execution or other process issued on a decree or order of any Court or Tribunal in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(*c*) if it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Tribunal shall take into account the contingent and prospective liabilities of the company.

xxx xxx xxx"

Section 439(1)(b) and Section 439(2) of the Companies Act, 1956 read as follows:

"**439. Provisions as to applications for winding up**.— (1) An application to the Tribunal for the winding up of a company shall be by petition presented, subject to the provisions of this section—

xxx xxx xxx

(*b*) by any creditor or creditors, including any contingent or prospective creditor or creditors; or

xxx xxx xxx

(2) A secured creditor, the holder of any debentures (including debenture stock), whether or not any trustee or trustees have been appointed in respect of such and other like debentures, and the trustee for the holders of debentures, shall be deemed to be creditors within the meaning of clause (*b*) of sub-section (1).

xxx xxx xxx"

Section 441, which deals with commencement of winding up, reads as follows:

> "**441. Commencement of winding up by Tribunal**.—(1) Where, before the presentation of a petition for the winding up of a company by the Tribunal, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the Tribunal, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.
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> (2) In any other case, the winding up of a company by the Tribunal shall be deemed to commence at the time of the presentation of the petition for the winding up."

Section 529(1) of the Companies Act reads as follows:

> "**529. Application of insolvency rules in winding up of insolvent companies**.—(1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to—
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> (*a*) debts provable;
> (*b*) the valuation of annuities and future and contingent liabilities; and
> (*c*) the respective rights of secured and unsecured creditors;
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> as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent:
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> xxx xxx xxx"

The reference made in Section 529 of the Companies Act, 1956 is to Section 47 of the Provincial Insolvency Act, 1920 which reads as follows:

> "**47. Secured creditors**.—(1) Where a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised.
> (2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.
> (3) Where a secured creditor does not either realise or relinquish his security, he shall, before being entitled to have his debt entered in the schedule, state in his proof the particulars of his security, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.
> (4) Where a security is so valued, the Court may at any time before realisation redeem it on payment to the creditor of the assessed value.
> (5) Where a creditor, after having valued his security, subsequently realises it, the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.
> (6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend."

7. The relevant provisions of the Recovery of Debts Act, 1993, read as follows:

> "**17. Jurisdiction, powers and authority of Tribunals**. —(1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to

entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.

(1-A) Without prejudice to sub-section (1),—

(*a*) the Tribunal shall exercise, on and from the date to be appointed by the Central Government, the jurisdiction, powers and authority to entertain and decide applications under Part III of Insolvency and Bankruptcy Code, 2016;

(*b*) the Tribunal shall have circuit sittings in all district headquarters.

(2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act.

(2-A) Without prejudice to sub-section (2), the Appellate Tribunal shall exercise, on and from the date to be appointed by the Central Government, the jurisdiction, powers and authority to entertain appeals against the order made by the Adjudicating Authority under Part III of the Insolvency and Bankruptcy Code, 2016."

"**18. Bar of jurisdiction**.—On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the matters specified in Section 17:

Provided that any proceedings in relation to the recovery of debts due to any multi-State co-operative bank pending before the date of commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 under the Multi-State Co-operative Societies Act, 2002 ((39 of 2002) shall be

continued and nothing contained in this section shall, after such commencement, apply to such proceedings."

"**19. Application to the Tribunal**.—
xxx xxx xxx
(19) Where a certificate of recovery is issued against a company as defined under the Companies Act, 2013 (18 of 2013) and such company is under liquidation, the Tribunal may by an order direct that the sale proceeds of secured assets of such company be distributed in the same manner as provided in Section 326 of the Companies Act, 2013 or under any other law for the time being in force.
xxx xxx xxx"

"**34. Act to have overriding effect**.—(1) Save as provided under sub-section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.
xxx xxx xxx"

8. In **Allahabad Bank v. Canara Bank** (supra), this Court dealt with whether the secured creditor, namely, Allahabad Bank in that case, was obliged to seek the leave of the Company Court under the Companies Act, 1956, and whether the Company Court can stay recovery proceedings which had been initiated under the Recovery of Debts Act in the event of a winding up order being passed under the Companies Act, 1956. In this context, this Court held, adverting to

Sections 17 and 18 of the Recovery of Debts Act, that the jurisdiction of the Tribunal in regard to adjudication of applications for recovery of debts under Section 17 is exclusive. No dual jurisdiction is contemplated, particularly having regard to Section 34 of the said Act, which has overriding effect over other statutes including the Companies Act, 1956 – *see* paragraphs 21 to 23. The said judgment further goes on to state:

> "**23.** …… The provisions of Section 34(1) clearly state that the RDB Act overrides other laws to the extent of "inconsistency". In our opinion, the prescription of an exclusive Tribunal both for *adjudication* and *execution* is a procedure clearly *inconsistent* with realisation of these debts in any other manner."
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> xxx xxx xxx
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> "**25.** Thus, the *adjudication* of liability and the *recovery* of the amount by *execution* of the *certificate* are respectively within the exclusive jurisdiction of the Tribunal and the Recovery Officer and no other court or authority much less the civil court or the Company Court can go into the said questions relating to the liability and the recovery except as provided in the Act. Point 1 is decided accordingly."
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> (emphasis in original)

9. In answering whether the Recovery of Debts Act overrides the provisions of Sections 442 and 537 and 446 of the Companies Act, 1956, this Court held that the Recovery of Debts Act is a special statute which would necessarily override the aforesaid provisions of

the more general statute, namely, the Companies Act, 1956. Even otherwise, if both are treated as special laws, since the Recovery of Debts Act is later in point of time, together with a non-obstante clause contained in Section 34, the said Act will prevail to the extent set out in the Recovery of Debts Act. This Court then concluded:

> "**50.** For the aforesaid reasons, we hold that at the stage of *adjudication* under Section 17 and *execution* of the certificate under Section 25 etc. the provisions of the RDB Act, 1993 confer exclusive jurisdiction on the Tribunal and the Recovery Officer in respect of debts payable to banks and financial institutions and there can be no interference by the Company Court under Section 442 read with Section 537 or under Section 446 of the Companies Act, 1956. In respect of the monies realised under the RDB Act, the question of *priorities* among the banks and financial institutions and other creditors can be decided only by the Tribunal under the RDB Act and in accordance with Section 19(19) read with Section 529-A of the Companies Act and in no other manner. The provisions of the RDB Act, 1993 are to the above extent inconsistent with the provisions of the Companies Act, 1956 and the latter Act has to yield to the provisions of the former. This position holds good during the pendency of the winding-up petition against the debtor Company and also after a winding-up order is passed. No leave of the Company Court is necessary for initiating or continuing the proceedings under the RDB Act, 1993. Points 2 and 3 are decided accordingly in favour of the appellant and against the respondents."

10. It is important to note that the aforesaid statement of the law was made in the context of non-requirement of leave of the Company

Court to initiate, continue with, and execute orders passed under the Recovery of Debts Act. What is important to note is that the Companies Act, 1956 is overridden to the extent of the inconsistency between the Companies Act, 1956 and the Recovery of Debts Act only *qua* recovery of debts due to banks and financial institutions.

11. It is settled law that a winding up proceeding initiated under Section 433(e) and 434 of the Companies Act, 1956 is not a means of seeking to enforce payment of a debt. This Court, in **Amalgamated Commercial Traders (P.) Ltd. v. A.C.K. Krishnaswami and Ors.**, (1965) 35 Comp Cas 456 (SC) ["**Amalgamated Commercial Traders**"], has held:

> "**13.** It is well-settled that "a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court."

This statement of the law has subsequently been followed in several judgments, one of which is **M/s IBA Health (India) Pvt. Ltd. v. M/s Info-Drive Systems Sdn. Bhd.**, (2010) 10 SCC 553 (at paragraph 21).

12. However, it was pointed out that a subsequent judgment of this Court, of the selfsame strength of three learned Judges, in **Harinagar Sugar Mills Co. Ltd. v. M.W. Pradhan**, (1966) 3 SCR 948 ["**Harinagar Sugar Mills**"], has held as follows:

> "**5.** …… Can it be said that the petition filed by the Receiver for winding up of the Company is not a mode of realisation of the debt due to the joint family from the Company? In *Palmer's Company Precedents*, Part II, 1960 Edn., at p. 25, the following passage appears:
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> > "A winding up petition is a perfectly proper remedy for enforcing payment of a just debt. It is the mode of execution which the Court gives to a creditor against a company unable to pay its debts."
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> This view is supported by the decisions in *Bowes* v. *Hope Life Insurance and Guarantee Co.* [(1865) II HLC 388], *Re General Company for Promotion of Land Credit* [(1870) LR 5 Ch D 380] and *Re National Permanent Building Society* [(1869) LR 5 Ch D 309]. It is true that "a winding up order is not a normal alternative in the case of a company to the ordinary procedure for the realisation of the debts due to it"; but nonetheless it is a form of equitable execution……"

13. It is true that this Court has stated that a winding up petition is a form of equitable execution of a debt, but this is qualified by stating that a winding up order is not a normal alternative to the ordinary procedure for realization of debts due to a creditor. We are of the view that both the judgments contained in **Amalgamated Commercial Traders** (supra) as well as in **Harinagar Sugar Mills** (supra),

recognize the fact that a winding up proceeding is not a proceeding that can be referred to as a proceeding for realization of debts and would, therefore, not be covered by the language of Section 17 read with Section 18 of the Recovery of Debts Act. When it comes to a winding up proceeding under the Companies Act, 1956, since such a proceeding is not "for recovery of debts" due to banks, the bar contained in Section 18 read with Section 34 of the Recovery of Debts Act would not apply to winding up proceedings under the Companies Act, 1956.

14. In point of fact, a Division Bench of the Bombay High Court in **Viral Filaments Ltd. v. Indusind Bank Ltd.**, (2001) 3 Mah LJ 552 reached this very conclusion after closely examining the judgment in **Allahabad Bank v. Canara Bank** (supra) of this Court. We approve of the reasoning contained in the aforesaid Bombay High Court judgment.

15. However, Shri K. Parameshwar, appearing on behalf of the appellants, also relied upon **Rajasthan State Financial Corporation v. Official Liquidator**, (2005) 8 SCC 190, and paragraph 18 of the aforesaid judgment, in particular. Paragraph 18 reads as follows:

"**18.** In the light of the discussion as above, we think it proper to sum up the legal position thus:

(*i*) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(*ii*) A District Court entertaining an application under Section 31 of the SFC Act will have the power to order sale of the assets of a borrower company-in-liquidation, but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(*iii*) If a financial corporation acting under Section 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-in-liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the Company Court and acting in terms of the directions issued by that court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of Section 529-A and Section 529 of the Companies Act.

(*iv*) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the SFC Act are not set in motion, the creditor concerned is to approach the Company Court for appropriate directions regarding the realisation of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the company-in-liquidation."

As a matter of fact, sub-paragraphs (i) and (iv) of paragraph 18 would show that proceedings before the DRT, and winding up proceedings under the Companies Act, 1956, can carry on in parallel streams. That is why paragraph 18(i) states that a Debts Recovery Tribunal, acting under the Recovery of Debts Act, would be entitled to order sale, and sell the properties of the debtor, even of a company in liquidation, but only after giving notice to the Official Liquidator, or to the Liquidator appointed by the Company Court, and after hearing him.

16. To similar effect is the judgment of this Court in **Official Liquidator v. Allahabad Bank**, (2013) 4 SCC 381, where this Court held as follows:

> "**24.** From the aforesaid authorities, it clearly emerges that the sale has to be conducted by DRT with the association of the Official Liquidator. We may hasten to clarify that as the present controversy only relates to the sale, we are not going to say anything with regard to the distribution. However, it is noticeable that under Section 19(19) of the RDB Act, the legislature has clearly stated that distribution has to be done in accordance with Section 529-A of the 1956 Act. The purpose of stating so is that it is a complete code in itself and the Tribunal has the exclusive jurisdiction for the purpose of sale of the properties for realisation of the dues of the banks and financial institutions."
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> xxx xxx xxx
>
> "**31.** The aforesaid analysis makes it luculent that DRT has exclusive jurisdiction to sell the properties in a

> proceeding instituted by the banks or financial institutions, but at the time of auction and sale, it is required to associate the Official Liquidator. The said principle has also been reiterated in *Pravin Gada* v. *Central Bank of India* [(2013) 2 SCC 101 : (2013) 1 SCC (Civ) 988].
>
> **32.** Once the Official Liquidator is associated, needless to say, he has a role to see that there is no irregularity in conducting the auction and appropriate price is obtained by holding an auction in a fair, transparent and non-arbitrary manner in consonance with the Rules framed under the RDB Act."

17. The second important point raised by learned counsel for the appellant is that a conjoint reading of the Companies Act, 1956 and the Provincial Insolvency Act, 1920, would make it clear that the secured creditor must, at the time of filing the petition for winding up, state that it has given up his security, or else, such winding up petition would not be maintainable. In **Hegde & Golay Limited v. State Bank of India**, ILR 1987 KAR 2673, a learned single Judge of the Karnataka High Court, Venkatachaliah, J. (as he then was), dealt with this point as follows:

> "**12.** Re: Point (a):
> The contention is that the Bank which is a secured creditor cannot maintain a winding-up petition without making an election either to give-up the security or value it as required by Section 9(2) of the Provincial Insolvency Act, 1920. It is urged that by Section 529(1) of the Act, the Rules of Insolvency in Section 9(2) are attracted.

Section 9(2) of the Provincial Insolvency Act reads:

> "If the petitioning creditor, is a secured creditor, he shall in his Petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent or given an estimate of the value of the security. In the latter case, he may be admitted as a petitioning-creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor".
>
> (emphasis in original)

13. The contention is that a secured-creditor may stand outside insolvency; but if he brings-up a creditor's winding-up petition he must, in his petition, state that he is either willing to relinquish the security for the benefit of the body of creditors or give an estimate of the value of the security. Learned Company-Judge has taken the view, if we may say so with respect, quite rightly, that this rule of Insolvency Law is not attracted to the presentation of a winding-up petition.

14. Sri Shetty says that both in bankruptcy and winding-up the law is the same and the petitioning-creditor, if he is a secured creditor, must conform to the rule in Section 9(2). He relied upon *M.K. Ranganathan* v. *Government of Madras* [AIR 1955 SC 604] and *Hansraj* v. *Official Liquidators, Dehradun Mussorie Electric Trading Company Limited* [AIR 1929 Allahabad 353]. The observation in *Ranganathan's case* [AIR 1955 SC 604] relied upon is this:

> "Section 229 recognises the position of the secured creditor generally as outside the winding up but enables him in the event of his desiring to take the benefit of the winding up proceedings to prove his debt, to value the same and share in the distribution pro rata of the assets of the company just in the same way as he would be able to do in the case of

> insolvency under the Presidency Towns Insolvency Act or the Provincial Insolvency Act".

In *Hansraj's case* [AIR 1929 Allahabad 353] it was observed:

> "…….. I am, therefore, of opinion that the rules contained in any Section of the Provincial Insolvency Act, the rules, if any, made under the Act and any appropriate established rules of practice in insolvency proceedings are imported into the Companies Act, unless there is something in the Companies Act itself already providing for the matter in question, or in conflict with the rule which it is proposed to import".

These observations, in our opinion, do not advance the contention of Sri Shetty any further. Section 529(1) of the 'Act' attracts the rules of insolvency to winding-up in relation to "the respective rights of secured and unsecured creditors" and confines these Rules so attracted to matters that arise between these two classes of creditors. Sections 528 and 529 of the 'Act' are in the chapter "Proof and Ranking of Claims" and deal with the question of proof of debts and the rights of secured and unsecured creditors. Section 529(2) itself, in so far it expressly envisages, and provides for, the contingency that if a secured-creditor proceeds to realise his security he should pay the expenses incurred by the Liquidator, by implication, rules out the construction contended for by Sri Shetty. The words "in winding-up of insolvent company" in Section 529(1) of the 'Act' has obvious reference to a post winding-up stage.

The point to note is that this rule of insolvency is attracted to winding-up in the matter of proof of debts. That is after the stage of the winding-up order. A secured creditor is, under Section 439(2) of the 'Act' as much a creditor entitled to present a winding up petition as any other. The law in regard to the right of a Secured Creditor to present a petition for adjudication under the

> Insolvency law is different from the right of a secured creditor to present a winding-up petition……"

Shri Parameshwar took exception to this statement of the law, and referred to Section 441 of the Companies Act, 1956, in particular, sub-section (2) thereof, to state that this judgment has missed the fact that the winding up of a company shall be deemed to commence at the time of presentation of the petition for winding up, and that, if this is so, the stage at which a secured creditor has to give up his security is at the stage of the filing of the winding up petition itself. We are afraid that we cannot agree. First and foremost, it is important to notice that under Section 439 of the Companies Act, 1956, a secured creditor's petition for winding up is maintainable without any requirement of it having to give up or relinquish its security. This is in contrast to Section 9(2) of the Provincial Insolvency Act, 1920, which reads as follows:

> "**9. Conditions on which creditor may petition**.—
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> xxx xxx xxx
>
> (2) If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent, or give an estimate of the value of the security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the

> value so estimated in the same way as if he were an unsecured creditor."

What is conspicuous by its absence is a provision akin to Section 9(2) of the Provincial Insolvency Act, 1920 in Section 439 of the Companies Act, 1956. In point of fact, Section 47 of the Provincial Insolvency Act, 1920 occurs only at the stage where an adjudication order has already been passed, which is the stage referred to by Section 529 of the Companies Act, 1956. In fact, Section 529(1)(c) of the Companies Act, 1956 specifically refers to the right of a secured creditor under the law of insolvency "with respect to the estates of persons adjudged insolvent". The express language of Section 529(1)(c) of the Companies Act, 1956 makes it clear that it is Section 47 of the Provincial Insolvency Act, 1920 alone that is attracted, and not Section 9(2), as was contended by learned counsel for the appellants before us. We may also add that reliance on Section 441(2) of the Companies Act, 1956 is misplaced for yet another reason. Section 441(2) has to be read with Section 441(1), and so read, makes it clear that it became necessary to enact sub-section (2), because a petition for voluntary winding up of a company presented before the Tribunal would be said to commence at an anterior point of time, namely, at the time of the

passing of the resolution whereby the company resolves to voluntarily wind itself up. In contrast, therefore, Section 441(2) says “in any other case”, i.e., in cases other than those falling under sub-section (1) of Section 441 of the Companies Act, 1956, the winding up of a company by the Tribunal shall be deemed to commence at the time of presentation of the petition for winding up. The context of the provision, therefore, makes it clear that it cannot be read so as to introduce Section 9(2) of the Provincial Insolvency Act, 1920 by the back door, as it were, when no such provision is contained in Section 439 of the Companies Act, 1956 itself. The absence, therefore, of any provision akin to Section 9(2) of the Provincial Insolvency Act, 1920 in Section 439 of the Companies Act, 1956; the language of Section 529(1)(c) of the Companies Act, 1956, which expressly refers only to Section 47 and not to Section 9(2) of the Provincial Insolvency Act, 1920; and the context in which Section 441(2) of the Companies Act, 1956 appears, namely, to contrast winding up petitions that have been filed under the Act with voluntary winding up petitions, all lead to the conclusion that there is no need to revisit the correct statement of the law by the learned single Judge of the Karnataka High Court. Indeed, this statement of the law has been followed subsequently by a Division

Bench of the Bombay High court in **Asian Power Controls Ltd. v. Bubbles Goyal**, (2013) 3 Mah LJ 811 as follows:

> "**10.** Section 529(1) of the Companies Act, 1956, provides that in the winding up of an insolvent company, the same rules shall prevail and be observed with regard to (a) debts provable; (b) the valuation of annuities and future and contingent liabilities; and (c) the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent. Under sub-section (2) of section 529, all persons who in any such case would be entitled to prove, for and receive dividends out of the assets of the company, may come in under the winding up, and make such claims against the company as they respectively are entitled to make by virtue of the section. Section 529-A provides an overriding preferential priority to the dues of the workmen and to the debts due to secured creditors to the extent to which such debts rank pari passu under clause (c) of the proviso to sub-section (1) of section 529 with such dues. The rules of insolvency which are attracted to proceedings of winding up are inter alia those pertaining to the proof of debts. This is after the stage of the winding up order. This principle has been enunciated in a judgment of Mr. Justice M.N. Venkatachaliah (as the learned Chief Justice then was) speaking for a Division Bench of the Karnataka High Court in *Hegde and Golay Limited* v. *State Bank of India*, ILR 1987 KAR 2673. The judgment of the Company Judge of this Court in *Canfin Homes Ltd.* (supra) has also followed the principle that the scheme of the provisions relating to winding up, particularly those in sections 528 and 529 would indicate that the stage of proving a claim of a debt arises after an order of winding up is passed. In *Canffin Homes Ltd.*, this Court held as follows:—
>
> > "15. The secured creditor who seeks to prove the whole of his debt in the course of the

> proceedings of winding up must before he can prove his debt relinquish his security for the benefit of the general body of the creditors. If he surrenders his security for the benefit of the general body of creditors, he may prove the whole of his debt. If the secured creditor has realised his security, he may prove for the balance due to him after deducting the net amount that has been realised. The stage for relinquishing security arises when a secured creditor seeks to prove the whole of his debt in the course of winding up. If, he elects to prove in the course of winding up the whole of the debt due and owing to him, he has to necessarily surrender his security for the benefit of the general body creditors."
>
> (emphasis in original)

Having regard to the position in law as consistently followed in the judgments of the Madras, Calcutta and Karnataka High Courts and as reiterated in the judgment of the Company Court in *Canfin Homes Ltd.*, it is not possible to accept the submission which was urged on behalf of the appellant. The law does not impose an unreasonable condition of requiring a secured creditor to forsake his security before he asserts a right to urge that a company which is unable to pay its debts should be wound up. The respondent has stated before the learned Company Judge, when the petition for winding up came up for hearing that it was not possible for the respondent to recover her dues by the sale of the land in respect of which a security has been created in favour of the respondent. The claim of the respondent is still to be proved in the course of the winding up proceedings. A secured creditor who has a mortgage, charge or lien on the property of the company as security for her debt may either: (a) enforce the security and prove in the winding up for the balance of the debt after deducting the amount realised; or (b) surrender the security to the Liquidator and prove for the whole of the debt as an unsecured

creditor; or (c) estimate the value of the property subject to her security, and prove for the balance of the debt after deducting the estimated value; or (d) rely on the security and not prove in the winding up proceedings. [*Pennington's Company Law* (Fourth edition, page 762)]. A secured creditor has the option of relinquishing his security and/or proving the entirety of his debt in the course of winding up. If the secured creditor does so in the course of winding up proceedings, the security will enure for the benefit of the body of creditors. On the other hand, it is open to a secured creditor to prove in the course of winding up proceedings to the extent of debt which has not been realised outside the proceedings for winding up by either accounting for the amount that has been so realised or by estimating the value of the property subject to security so as to enable him to prove in respect of the balance of the debt. On either view of the matter, that stage is still to arrive."

18. In fact, even in **Jitendra Nath Singh v. Official Liquidator,** (2013) 1 SCC 462, this Court, after referring to Section 47 of the Provincial Insolvency Act, 1920 and Section 529 of the Companies Act, 1956, held as follows:

> "**16.1.** A secured creditor has only a charge over a particular property or asset of the company. The secured creditor has the option to either realise his security or relinquish his security. If the secured creditor relinquishes his security, like any other unsecured creditor, he is entitled to prove the debt due to him and receive dividends out of the assets of the company in the winding-up proceedings. If the secured creditor opts to realise his security, he is entitled to realise his security in a proceeding other than the winding-up proceeding but has to pay to the liquidator the costs of preservation of the security till he realises the security."
>
> (emphasis supplied)

xxx xxx xxx

"**17.** In support of our aforesaid conclusions, we may now cite some authorities. In *Allahabad Bank* v. *Canara Bank* [(2000) 4 SCC 406], a two-Judge Bench of this Court speaking through M. Jagannadha Rao, J. discussed these rights of the secured creditors in paras 62, 63, 64 and 65 of the judgment as reported in SCC, which are extracted hereinbelow: (SCC pp. 435-36)

> "*62.* Secured creditors fall under two categories. Those who desire to go before the Company Court and those who like to stand outside the winding up.
>
> *63.* The first category of secured creditors mentioned above are those who go before the Company Court for dividend by relinquishing their security in accordance with the insolvency rules mentioned in Section 529. The insolvency rules are those contained in Sections 45 to 50 of the Provincial Insolvency Act. Section 47(2) of that Act states that a secured creditor who wishes to come before the Official Liquidator has to prove his debt and he can prove his debt only if he relinquishes his security for the benefit of the general body of creditors. In that event, he will rank with the unsecured creditors and has to take his dividend as provided in Section 529(2). Till today, Canara Bank has not made it clear whether it wants to come under this category.
>
> xxx xxx xxx"

19. We now come to the argument based on Section 434(1)(b) of the Companies Act, 1956. It is obvious that Section 434(1)(b) is attracted only if execution or other process is issued in respect of an

order of a Tribunal in favour of a creditor of the company is returned unsatisfied in whole or in part. This is only one of three instances in which a company shall be deemed to be unable to pay its debts. If the fact situation fits sub-clause (b) of Section 434(1), then a company may be said to be deemed to be unable to pay its debts. However, this does not mean that each one of the sub-clauses of Section 434(1) are mutually exclusive in the sense that once Section 434(1)(b) applies, Section 434(1)(a) ceases to be applicable. Also, on the facts of this case, we may state that the company petition was filed only on 03.07.2015, pursuant to a notice under Section 433 of the Companies Act, 1956 dated 15.04.2015. This petition was filed under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956. At the stage at which the petition was filed, it could not possibly have been filed under Section 434(1)(b) of the Companies Act, 1956, as execution or other process in the form of a recovery certificate had not been issued by the Recovery Officer till 12.08.2015, i.e., till after the company petition was filed. For this reason also, it is clear that this contention of the learned counsel appearing for the appellant must be rejected.

20. We may only end by saying that cases like the present one have to be decided by balancing the interest of creditors to whom money is owing, with a debtor company which will now go in the red since a winding up petition is admitted against it. It is not open for persons like the appellant to resist a winding up petition which is otherwise maintainable without there being any *bona fide* defence to the same. We may also hasten to add that the respondent cannot be said to be blowing hot and cold in pursuing a remedy under the Recovery of Debts Act and a winding up proceeding under the Companies Act, 1956 simultaneously. Here, it is important to refer to the judgment of Lord Atkin in **Lissenden v. C.A.V. Bosch, Ltd.**, [1940] 1 All E.R. 425, at 436-437, which says:

> "The doctrine of election could have no place in the present case. The applicant is not faced with alternative rights. It is the same right that he claims, but in larger degree. In *Mills* v. *Duckworth*, [1938] 1 All E.R. 318, a plaintiff who had been awarded damages for negligence had taken the judgment sum out of a larger sum paid into Court and had then appealed against the quantum of damages, and was met by a similar objection to his appeal. Greer, L.J., in overruling the objection, pointedly said, at p. 321:
>
> > "He [the plaintiff] said: "I am not going to blow hot and cold. I am going to blow hotter."
>
> Here the applicant is not faced with a choice between alternative rights. He has exercised an undisputed right

> to compensation, and claims to have a right to more. One has not lost one's right to a second helping because one has taken the first."

When secured creditors like the respondent are driven from pillar to post to recover what is legitimately due to them, in attempting to avail of more than one remedy at the same time, they do not "blow hot and cold", but they blow hot and hotter. The appeals are accordingly dismissed with no order as to costs.

……J.
(R.F. Nariman)

……J.
(Navin Sinha)

New Delhi
January 29, 2019